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(Consolidated)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-847

COMMON CAUSE, *et al.*,
Appellants,
v.
HARRISON SCHMITT, *et al.*,
Appellees.

No. 80-1067

FEDERAL ELECTION COMMISSION,
Appellant,
v.
AMERICANS FOR CHANGE, *et al.*,
Appellees.

On Appeal from the United States District Court for the District of Columbia

BRIEF OF APPELLANTS COMMON CAUSE, DAVID COHEN AND WINIFRED LONG

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QUESTIONS PRESENTED

The Presidential Election Campaign Fund Act provides for public funding of major-party candidates for President in return for their voluntary promises not to accept private financial contributions and not to incur expenses in excess of the public grant. In *Buckley* v. *Valeo*, 424 U.S. 1, 96 (1976), this Court upheld the basic arrangement "as a means of eliminating the improper influence of large private contributions."

The questions presented in this case are:

1. Whether Congress violated the First Amendment by including in the public-financing plan a $1,000 limit on expenditures by an unaffiliated "political committee" "to further the election of" a candidate who has agreed that he and his affiliated committees will not take contributions or incur campaign expenses in excess of his public funds.

2. Whether the congressional justification for limiting such expenditures by unaffiliated "political committees" should have been rejected, and the limit held unconstitutional, upon a motion to dismiss and without development of a factual record.*

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* In addition to the parties named in the captions, the other parties to the proceedings below were plaintiffs-appellants David Cohen and Winifred Long, and defendants-appellees Carl T. Curtis, Americans for an Effective Presidency, and Fund for a Conservative Majority.

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On Appeal from the United States District Court for the District of Columbia

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BRIEF OF APPELLANTS COMMON CAUSE, DAVID COHEN AND WINIFRED LONG

These consolidated cases appeal a decision of a three-judge United States District Court sitting in the District of Columbia, which held 26 U.S.C. § 9012(f) unconstitutional under the First Amendment. Section 9012(f) is part of the Presidential Election Campaign Fund Act, as amended, 26 U.S.C. ch. 95 ("Fund Act").

OPINION BELOW

The September 30, 1980 opinion and order of the district court are not yet reported. They are reproduced as Appendix A to the Jurisdictional Statement filed in No. 80-847 by appellants Common Cause, David Cohen and Winifred Long ("appellants").[1]

JURISDICTION

The proceedings below consisted of two consolidated civil actions, one brought by appellants (Civil Action No. 80-1609) and the second brought by the Federal Election Commission ("the Commission") (Civil Action No. 80-1754). The actions were heard and decided together by a three-judge district court, pursuant to 26 U.S.C. § 9011 (b) (2). On August 28, 1980 the court entered orders granting appellees' motions for summary judgment and dismissing both actions (Appendices B and C, C.C. App. 31a, 33a). On September 25, 1980, the court entered an order formally consolidating the two cases (Appendix F, C.C. App. 37a). On September 30, 1980 the court issued an opinion and entered a further order disposing of the cases consistently with its earlier orders (C.C. App. 1a, 30a).

Appellants filed timely notices of appeal on September 26, 1980 (Appendices D and E, C.C. App. 35a, 36a) and a timely amended notice of appeal on October 3, 1980 (Appendix G, C.C. App. 39a). Appellants filed a timely Jurisdictional Statement and docketed their appeal in No. 80-847 on November 25, 1980. The Commission docketed its appeal in No. 80-1067 on December 29, 1980.

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[1] Citations to pages of the Appendices To The Jurisdictional Statement filed by appellants are given as "C.C. App. ——."

Appendix I to that Jurisdictional Statement (C.C. App. 69a-84a) is the Amended Complaint, without Exhibits, filed by appellants. The Exhibits to the Amended Complaint could not practicably be reproduced in the main volume of Appendices. They have, accordingly, been lodged with the Court in a separate volume. Citations to pages in that volume are given as "C.C. App. (Supp.) ——."

This Court noted probable jurisdiction in both appeals and consolidated them on February 23, 1981. Jurisdiction over the appeals is conferred by 26 U.S.C. § 9011 (b) (2) and 28 U.S.C. §§ 1252, 1253 and 2101(b).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment provides, in relevant part:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble . . . ."

26 U.S.C. § 9012(f) provides, in relevant part:

> ". . . [I]t shall be unlawful for any political committee which is not an authorized committee with respect to the eligible candidates of a political party for President and Vice President in a presidential election knowingly and willfully to incur expenditures to further the election of such candidates, which would constitute qualified campaign expenses if incurred by an authorized committee of such candidates, in an aggregate amount exceeding $1,000." [2]

STATEMENT OF THE CASE

A. The Statutory Framework.

In 1971 Congress enacted the Presidential Election Campaign Fund Act to provide for public financing as an optional alternative to private fundraising in Presidential general election campaigns. To be eligible for public financing, a major-party candidate must certify

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[2] Appendix H to appellants' Jurisdictional Statement sets forth (1) the text of the Fund Act, of which 26 U.S.C. § 9012(f) is a part (C.C. App. 41a-66a), and (2) related provisions of the Federal Election Campaign Act of 1971, as amended ("FECA"), 2 U.S.C. §§ 441a(b) and 441a(c) (C.C. App. 66a-68a).

that he and his "authorized committees" [3] will not incur aggregate "qualified campaign expenses" [4] in excess of the amount of the public payment [5] and will not accept contributions to defray campaign expenses. 26 U.S.C. §§ 9003(b), 9012(a)(1) & (b)(1).

The section at issue in this case, 26 U.S.C. § 9012(f), complements these provisions by regulating "political committees" that are not "authorized committees" of the publicly financed candidate—*i.e.*, political committees that collect private contributions to support the candidate but are not part of his official campaign. Section 9012(f) limits such political committees to spending $1,000 "to further the election of" the candidate. Section 9012(f) applies only to "political committees," and not to individuals or to other groups.

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[3] The Fund Act defines a "political committee" as

> "any committee, association, or organization (whether or not incorporated) which accepts contributions or makes expenditures for the purpose of influencing, or attempting to influence, the nomination or election of one or more individuals to Federal, State, or local elective public office." 26 U.S.C. § 9002(9).

A political committee is an "authorized committee" of candidates for President and Vice President if it is "authorized in writing by such candidates to incur expenses to further the election of such candidates." 26 U.S.C. § 9002(1).

[4] "Qualified campaign expenses" include all campaign-related expenses incurred by the candidate or by his authorized committees. 26 U.S.C. § 9002(11). An expense incurred by a person authorized by the candidate (or by one of his authorized committees) is charged to the candidate (or the committee). *Id.*

[5] The public grant for a particular Presidential general election is equal to $20,000,000, adjusted for changes in the Consumer Price Index. *See* 26 U.S.C. § 9004(a); 2 U.S.C. §§ 441a(b)(1)(B), 441a(c). For the 1980 general election, the public grant was $29,440,000.

B. The Factual Background.[6]

President Reagan, as the 1980 Republican Party candidate, opted for public financing and agreed not to accept private campaign contributions and not to incur campaign expenses in excess of the public grant. Political committees that were not authorized committees of Mr. Reagan thus became subject to Section 9012(f).

Appellees Americans for Change ("AFC"), Americans for an Effective Presidency ("AEP"), and Fund for a Conservative Majority ("FCM") are "political committees" within the meaning of the Fund Act. *See* C.C. App. 74a, 75a, 77a. None was an authorized committee of Mr. Reagan. Each claims to have been independent of the Reagan campaign.[7]

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[6] Because the district court denied appellants' requests for factual development, the district court record contains essentially no information beyond what was in the pleadings. *See* note 21 *infra*. Consequently, some of the figures given later in this section are taken from the "Data Compiled From the Public Records of the Federal Election Commission," which the Commission lodged with this Court on April 28, 1981. Other figures were derived directly from reports filed with the Commission by the respective committees.

[7] We use the terms "the Reagan campaign" and "the official Reagan campaign" to refer to Ronald Reagan, his authorized committees and their agents. His authorized committees included the Reagan For President Committee, the Reagan for President General Election Committee, the Reagan For President Compliance Fund and the 1980 Republican Presidential Unity Committee. (*See* Statement of Candidacy of Ronald Reagan, filed with the Federal Election Commission and dated June 26, 1980.) The Republican National Committee was also an authorized committee and agent of the Reagan campaign. (*See* Exhibit A to Affidavit of William E. Brock, III, filed July 24, 1980, on behalf of the Reagan For Presi-

Notwithstanding Section 9012(f), appellees announced that they intended to collect and spend, in the aggregate, between $26 million and $48 million to further Mr. Reagan's election.[8] To that end, each mounted a nationwide fundraising campaign, primarily through computerized mass mailings. C.C. App. 77a-79a.[9] At least two of the committees operated under, and featured in their fundraising literature, names designed to foster the impression that they were arms of the Reagan campaign.[10] Appellees encouraged contributors to give to them the money that could not lawfully be contributed to Mr. Reagan directly, so that they could spend it on his behalf. For example, AFC's literature stated:

> " 'Reagan for President in '80' is being sponsored by Americans For Change, because federal campaign financing laws prohibit national candidates from ac-

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dent General Election Committee and Ronald Reagan in *Carter-Mondale Reelection Committee* v. *Federal Election Commission*, No. 80-1842 (D.C. Cir. 1980).)

[8] *See* C.C. App. 71a, 77a-79a; C.C. App. (Supp.) 7b. Two of the committees (AFC and AEP) were formed in the summer of 1980 for the specific purpose of raising money to support the Reagan general election campaign.

[9] Solicitation materials were sent to thousands of individuals whose names appeared on mailing lists that appellees purchased, rented or otherwise obtained. *See* C.C. App. (Supp.) 4b-7b, 38b-48b.

[10] AFC operated under the name "Reagan For President in '80." C.C. App. 77a; C.C. App. (Supp.) 4b, 6b, 7b. FCM operated under the name "Citizens For Reagan in '80." C.C. App. 79a; C.C. App. (Supp.) 38b-48b. Appellees' use of these names violated the spirit, if not the letter, of 2 U.S.C. § 432(e)(4) (Supp. III 1979), which prohibits political committees that are not authorized committees of a candidate from using the candidate's name in their titles.

cepting personal contributions since they receive federal funds.' " C.C. App. 4b.[11]

Appellees collected and spent millions of dollars in private contributions to further Mr. Reagan's candidacy. Millions more were collected and spent by other political committees claiming to be independent—most notably, the North Carolina Congressional Club ("NCCC"), operating under the name "Americans for Reagan," and the National Conservative Political Action Committee ("NCPAC"), operating under the name "The Ronald Reagan Victory Fund."[12] These five committees collected more than $21.5 million throughout 1979 and 1980, and approximately $13.7 million during the 1980 general election campaign alone. And they spent $7.75 million to further Mr. Reagan's candidacy during the period following his July 18, 1980 certification for public funds.[13]

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[11] Similarly, FCM's literature stated:

> *"BY LAW YOU CANNOT CONTRIBUTE DIRECTLY TO REAGAN'S CAMPAIGN* NOW THAT HE HAS BEEN NOMINATED.
>
> "SO IT IS OBVIOUS THAT *RONALD REAGAN NEEDS 'CITIZENS FOR REAGAN IN '80'* . . . .
>
> ". . . .
>
> *"RONALD REAGAN NEEDS YOU TO SUPPORT 'CITIZENS FOR REAGAN IN '80' IF HE IS TO BE ELECTED PRESIDENT."*

(*Quoted in* Plaintiffs' Opening Brief on the Merits at 16, filed by appellants in Civil Action No. 80-1609 on August 4, 1980 (emphasis in original).)

[12] *See* Plaintiff Federal Election Commission's Local Rule 1-9(h) Statement of Material Facts As To Which There Is No Genuine Dispute at ¶¶ 42-58, filed by the Commssion in Civil Action No. 80-1754 on August 4, 1980 (hereinafter "FEC Statement").

[13] According to the data compiled by the Commission and lodged with the Court, the following expenditures were made by the five committees:

[Footnote continued on page 8]

Professional political managers ran each committee and decided when, where, and how to spend the money.[14] C.C. App. 77a, 78a, 79a; C.C. App. (Supp.) 6b, 17b-18b. The contributors to the appellee committees had no control over the committees' activities, operations, or spending decisions. Although AFC's managers invited contributors to send in their "thoughts and suggestions," they told the contributors that "[t]he decisions on expenditures must be controlled by the Committee." C.C. App. (Supp.) 6b. FCM's managers just asked for money, and did not invite contributors to send in their views. *Id.* at 38b-48b. AEP's initial press release attempted to create the appearance that the managers sought contributor participa-

[13] [Continued]

	Expenditures Made During 1979 and 1980	Expenditures Made Following Mr. Reagan's July 18, 1980 Certification For Public Financing
AFC	$ 711,856	$ 711,856
AEP	1,270,208	1,270,208
FCM	1,775,535	888,806
NCCC	3,358,796	2,863,179
NCPAC	2,204,052	2,015,583
Total	$9,320,447	$7,749,632

Notes: (1) The figures for FCM cover only through October 15, 1980, because FCM has failed to file reports covering the remainder of the year.

(2) The figures for FCM and NCPAC include expenditures listed as anti-Carter as well as those listed as pro-Reagan.

[14] The managers decided not only what expenditures to make to further Mr. Reagan's election, but also what other candidates to support and how much to contribute to or spend for them. According to the Commission's data, the five committees contributed a total of $394,000 to candidates for Federal offices other than President.

tion through periodic polls and meetings, but there is no evidence (record or otherwise) of any actual participation or control by the contributors.[16] NCPAC's and NCCC's managers similarly gave contributors no role in deciding how their contributions should be spent.[16]

Organizers and managers of the committees had been involved in running past Republican Party presidential campaigns, C.C. App. 76a-77a,[17] and had interlocking relationships with authorized Reagan committees during the 1980 campaign. AFC shared high-level personnel (including officers) with the Republican National Committee, the 1980 Republican Presidential Unity Committee and the Reagan For President Committee, C.C. App. 74a-75a, and took part in the 1980 Republican National Convention. C.C. App. 78a; C.C. App. (Supp.) 11b. High-level personnel moved between AEP and both the Republican National Committee and the Reagan campaign organization. C.C. App. 76a. Appellees also

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[15] According to the release, every contributor would automatically become a "Member" of AEP, and virtually every "Member" could automatically be deemed a "Participating Member." C.C. App. (Supp.) 16b. "Participating Members" were to be "periodically polled and invited to periodic meetings to consider policy questions before the organization." *Id.* at 17b. Because the district court disallowed discovery, the record does not disclose whether any polls were taken or any meetings held.

[16] In the case of NCPAC, the Chairman and Executive Committee made the decisions. *See* FEC Statement, *supra* note 12, ¶ 52. NCCC's management decisions were made by the Chairman and the Executive Director. *See North Carolina's Congressional Club Working Hard for Strong America*, Conservative Digest 16, 17 (Dec. 1980)

[17] One of the managers of the *1980* primary campaign for Mr. Reagan's running mate, George Bush, directed NCPAC's "Ronald Reagan Victory Fund" during the general election campaign. *See NCPAC's Terry Dolan: He's Playing Key Role in New Right's Successes*, Conservative Digest 2, 4 (Dec. 1980); *Evans-Novak Political Report*, May 27, 1980 (No. 386), at 3.

shared common campaign consultants and vendors with the Reagan campaign, as did NCCC and NCPAC.[18]

C. The Proceedings Below.

Appellants and then the Commission filed actions challenging the legality of appellees' activities under Section 9012(f). Both actions sought a declaratory judgment that appellees' activities, whether or not actually independent of the Reagan campaign, violated Section 9012(f).[19] Both requested that a three-judge district court be convened, and the proceedings expedited, pursuant to 26 U.S.C. § 9011(b). Appellants sought immediate discovery.

Appellees opposed discovery and moved for summary judgment and dismissal on the ground that Section

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[18] For example, expenditure and disbursement reports filed with the Commission show that: (1) the Reagan for President Committee, AFC, NCC and NCPAC all shared the same direct mail and telephone solicitation firm; (2) the Reagan for President Committee, NCCC and NCPAC all shared a common political consultant and pollster; (3) the Reagan for President Committee, the Republican Presidential Unity Committee, the Republican National Committee, AFC, FCM and NCPAC all shared the same printing house and office supplier; and (4) AFC and the Republican National Committee shared the same supplier of mailing lists, the same political consulting firm, and the same political telephoning and mailing company.

[19] Appellants' cause of action based on Section 9012(f) was set forth in Count I of their Amended Complaint. *See* C.C. App. 77a-81a. Appellants also alleged, in Count II, that appellees were not in fact independent of the official Reagan campaign and that their expenditures should therefore be treated as contributions to and expenditures by the campaign. *See* C.C. App. 81a-82a. Appellants renewed that allegation in a still-pending administrative complaint filed with the Commission pursuant to 2 U.S.C. § 437g (Supp. III 1979), and are not appealing the district court's dismissal of Count II for lack of jurisdiction and failure to state a claim. Thus, for purposes of this appeal, we assume *arguendo* that the expenditures of AFC, AEP and FCM are not to be charged to the official Reagan campaign or treated as contributions to it.

9012(f) is unconstitutional.[20] The district court stayed all discovery.[21] Relying on *Buckley* v. *Valeo*, 424 U.S. 1 (1976), the court held Section 9012(f) unconstitutional under the First Amendment without developing any factual record.[22]

SUMMARY OF ARGUMENT

Section 9012(f), which imposes a $1,000 limit on expenditures by unauthorized political committees to further the election of a publicly financed Presidential candidate, is an essential part of the Fund Act's system of public financing for Presidential general election campaigns—a system that "furthers, not abridges, pertinent First Amendment values." *Buckley* v. *Valeo*, 424 U.S. at 93 (footnote omitted). This Court has previously

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[20] Appellees and the Commission also moved to dismiss appellants' action on the ground that the action, as it then stood, impinged upon the Commission's jurisdiction over the enforcement of the federal election laws, notwithstanding the plain language of 26 U.S.C. § 9011(b). The district court dismissed Count II (but not Count I) of appellants' action on this ground.

[21] Thus, the record before the district court consisted essentially of (1) the allegations in, and the exhibits to, appellants' Amended Complaint, (2) the allegations in the Commission's Complaint, (3) additional factual allegations (together with supporting citations) set forth in Plaintiffs' Opening Brief on the Merits, filed by appellants in Civil Action No. 80-1609 on August 4, 1980, and (4) the documentation submitted by the Commission on August 4, 1980 in support of its motion for summary judgment. In addition, AFC submitted a conclusory affidavit of its Chairman, Senator Harrison Schmitt, on August 4, 1980. Appellants were not allowed to conduct discovery concerning the matters discussed in the affidavit.

[22] The court granted summary judgment for appellees in the Commission's action. C.C. App. 30a. It then dismissed Count I of appellants' action "as mooted pursuant to our decision in the FEC action." *Id.* at 25a. *See also id.* at 30a. Count II of appellants' action, which is not involved in this appeal, was dismissed for lack of jurisdiction and failure to state a claim. C.C. App. 31a. *See* note 19 *supra*.

sustained the Fund Act's ceiling on campaign expenditures by a publicly financed candidate, and the Court has indicated that other limits on expenditures in candidate elections are constitutionally permissible if they serve a compelling governmental purpose, are narrowly tailored to achieve that purpose, and do not unnecessarily interfere with speech and associational freedoms. Section 9012(f), which differs in every material respect from the broad "independent expenditure" limitation overturned in *Buckley*, satisfies this test and is therefore constitutional.

Section 9012(f) serves an extremely compelling governmental interest—protecting the Presidency from the corrosive effects of large aggregations of financial power. It preserves the integrity of, and public confidence in, the Presidency by minimizing the risk that publicly funded candidates will become beholden to fundraisers who amass and control large political funds for the candidate's benefit. In addition, the Section prevents evasion of the Fund Act's ban on direct contributions to such candidates—a ban that this Court has previously sustained. Eliminating Section 9012(f) would, moreover, utterly frustrate Congress' intent that public financing serve as an optional substitute for, rather than a supplement to, private fundraising.

Section 9012(f) is narrowly drawn to accomplish the objective of preserving governmental integrity. It applies only to "political committees," whose ability to accumulate and funnel huge sums of money poses the greatest threat to the independence and integrity of publicly financed Presidential candidates. The Section places no limit whatsoever on the speech and associational freedoms of individuals or of groups that are not "political committees."

Section 9012(f) does not unnecessarily interfere with the exercise of speech and associational freedoms by anyone. It leaves everyone free to speak and associate effec-

tively in Presidential campaigns. The only associational interests that Section 9012(f) in any way affects are the "marginal" interests inherent in contributions to political committees, 424 U.S. at 20, and, under *Buckley*, Congress may limit those interests in order to preserve governmental integrity.

This Court should accept Congress' judgment concerning the need for Section 9012(f), particularly since Congress has special expertise in this area. If, however, the Court is not satisfied that Congress' judgment was justified, the Court should vacate the decision below and remand the case to the district court with directions to take evidence, hear testimony, and apply the correct constitutional standard to the record as developed.

ARGUMENT

I. SECTION 9012(f) DOES NOT VIOLATE THE FIRST AMENDMENT.

Although this case arose during the 1980 election, the central constitutional question will affect Presidential elections and confidence in representative government for years to come. The Court below held that the First Amendment renders Congress powerless to protect the integrity of the Presidency and the efficacy of public financing from the effects of campaign finance practices that Congress properly found to be corrosive. We submit that Congress does have power to enact appropriate legislation that serves these paramount interests, even if it has the effect of curbing some avenues of association and expression. In particular, where the statute does not censor ideas or suppress information, or even limit the money potentially available for speech, it should be found constitutional if it is narrowly tailored to accomplish its goals and the interests it serves outweigh any limitation on the ways of raising and spending money for campaign speech. Section 9012(f) meets this test.

Buckley v. *Valeo* sustained the constitutionality of the basic system of public financing for Presidential general election campaigns. In *Buckley* the Court observed that the Fund Act

> "is a congressional effort not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people. Thus, [the Fund Act] *furthers, not abridges, pertinent First Amendment values.*" 424 U.S. at 92-93 (emphasis added; footnotes omitted).

Buckley also held that Congress did not violate the First Amendment by banning private contributions to publicly funded Presidential campaigns, or by prohibiting publicly funded campaigns from making expenditures in excess of the public subvention. *Id.* at 57 n.65. *Accord, Republican National Committee* v. *Federal Election Commission*, 487 F. Supp. 280 (S.D.N.Y.) (three-judge court), *aff'd mem.*, 445 U.S. 955 (1980).

The court below mistakenly supposed that invalidation of Section 9012(f) was dictated by an aspect of the decision in *Buckley* that did not involve the Fund Act. *Buckley* overturned an across-the-board prohibition against any "independent expenditure" in excess of $1,000 in any Federal election, whether or not publicly funded. *See* 424 U.S. at 39-40. That broad prohibition, which encompassed personal expenditures by individuals (whether acting singly or jointly) to publicize their own ideas and views, was held unconstitutional because it did not "presently appear" to the Court that those expenditures posed any serious dangers to the integrity of elected Federal officeholders or to public confidence in government. *Id.* at 46.

This case is altogether different. Section 9012(f) is narrow. No one here is complaining, or could complain, that Section 9012(f) curtails his right of personal speech.

Section 9012(f) reaches only "political committees," and it applies only to publicly financed Presidential campaigns for which the candidate has agreed not to accept or spend private contributions. The kinds of dangers that were not "presently apparent" in *Buckley* are present here. Nationwide, privately financed, million-dollar shadow campaigns like those of appellees pose obvious threats to the independence of publicly funded candidates.

Common sense and experience confirm Congress' expert determination that Section 9012(f) is needed. Section 9012(f) should therefore be upheld as an essential bulwark of the public financing plan enacted by Congress to protect the integrity of the Presidency and preserve public confidence in representative government.

A. The First Amendment Permits Limits on Campaign-Related Expenditures Where Necessary To Achieve Compelling Public Purposes Unrelated to the Suppression of Ideas or Information.

First Amendment freedoms are not absolute. In *Consolidated Edison Co.* v. *Public Service Commission*, 447 U.S. 530, 535 (1980), the Court observed:

> "The Commission's ban on bill inserts [that discuss controversial political and public issues] is not, of course, invalid merely because it imposes a limitation upon speech."

Accord, First National Bank of Boston v. *Bellotti*, 435 U.S. 765, 786 (1978).

The First Amendment affords the greatest protection against governmental attempts to censor speech or suppress ideas because of some supposed danger flowing from their effect on the minds or conduct of the audience. Such censorial restrictions on speech can be justified only in very narrow circumstances—for example, by

proof of an overwhelming public exigency, or of the utter worthlessness of the message.[23] The strict rule against censorship and suppression applies most strongly in the realm of political debate, and it follows directly from the most fundamental proposition in the philosophy behind the First Amendment—that no branch of government, whether legislative or executive or judicial, may judge the relative danger or worth of ideas or information pertaining to government, politics or other matters of public importance in terms of their effect on listeners' minds. *Bellotti*, 435 U.S. at 791 & n.31.

A less strict First Amendment standard applies to restrictions on speech or expressive activity that are designed to obviate serious public evils other than dangers supposedly inherent in the content and impact upon the public of the ideas or information expressed.[24] Here,

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[23] *See, e.g., Miller* v. *California*, 413 U.S. 15 (1973) (obscenity); *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 572-73 (1942) (fighting words); *Whitney* v. *California*, 274 U.S. 357, 373-78 (1927) (Brandeis, J., concurring).

[24] The distinction is *not* between words and conduct. The difference that we emphasize is readily illustrated. Legislation might restrict the amount of paper available for newsprint. If the only justification available were that the newspapers were undermining confidence in the government by disseminating dangerous political information or ideas, the Court could invalidate the statute without weighing the justification. On the other hand, if the legislation were the result of a wartime shortage of paper required for other essential needs, the very same restriction would be upheld if the public need for rationing paper outweighed the impact upon expression. *Cf. Branzburg* v. *Hayes*, 408 U.S. 665 (1972); *Associated Press* v. *United States*, 326 U.S. 1, 20 (1945); *Associated Press* v. *NLRB*, 301 U.S. 103, 132 (1937). Similarly, a tax on or regulation of speech-related conduct will be judged with severity if its function is simply to curtail publication, *cf. Grosjean* v. *American Press Co.*, 297 U.S. 233 (1936), while even the utterance of words or distribution of leaflets may be subordinated to other public interests at a particular time or place

there is room for balancing. The accepted test of constitutionality in such cases is to inquire whether the regulation serves an "important" or "compelling" or "paramount" public purpose. Even a statute that directly restricts the speech of a private person may be sustained if the statute is "a narrowly tailored means of serving a compelling state interest." *Consolidated Edison Co.*, 447 U.S. at 535. *Accord, id.* at 540 (*citing Bellotti*, 435 U.S. at 786, *and Buckley*, 424 U.S. at 25).[25]

Prior decisions of this Court show that the less strict standard—which weighs the justification against the burden—applies to campaign finance regulations, whether they affect "contributions" or "expenditures."[26] *Buckley* held that the same interests that support Section 9012(f) were sufficiently compelling to outweigh the interference with First Amendment freedoms worked by contribution limitations. 424 U.S. at 29. The Court similarly weighed

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so long as the government does not "undertake[] selectively to shield the public from some kinds of speech on the ground that they are more offensive than others . . . ." *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 209 (1975).

[25] The same test applies to statutes that directly restrict associational freedoms, even in the context of political campaigns. As this Court stated in *Buckley*:

> "Even a '"significant interference" with protected rights of political association' may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms." 424 U.S. at 25 (citations omitted).

See also Democratic Party v. *LaFollette*, 101 S. Ct. 1010, 1020 (1981); *Civil Service Commission* v. *Letter Carriers*, 413 U.S. 548, 567 (1973).

[26] Lower courts deciding constitutional challenges to campaign finance regulations have likewise weighed the importance of the governmental interests at stake against any arguable infringements on First Amendment freedoms. *See, e.g., Bread Political Action Committee* v. *Federal Election Commission*, 635 F.2d 621, 627-29 (7th Cir. 1980) (*en banc*), *appeal docketed*, 49 U.S.L.W. 3685 (1981).

competing interests in considering both the particular expenditure limitations at issue in *Buckley*[27] and also the ban on expenditures by corporations to influence the outcome of referenda at issue in *Bellotti*.[28] And the Court has struck the balance in favor of some limits on campaign expenditures—including the Fund Act's ceiling on overall expenditures incurred by a publicly financed Presidential campaign. *See* p. 14 *supra*.[29]

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[27] *See, e.g.*, 424 U.S. at 47-48 (the particular "independent expenditure" ceiling fails to serve a substantial governmental interest and heavily burdens protected expression); *id.* at 53-54 (limitation on a candidate's expenditure of his own personal funds is not sufficiently supported by the governmental interest in preventing actual and apparent corruption to justify infringement of his First Amendment rights); *id.* at 55-56 (the governmental interests advanced to support the limitation on overall campaign expenses are not sufficient to justify restricting the quantity of political expression).

Nothing in the introductory "General Principles" discussion in *Buckley, id.* at 14-23, suggests that the Court meant to depart from this generally applicable approach in determining the constitutionality of particular expenditure limitations. To be sure, the discussion emphasized that expenditure limits impinge on protected First Amendment freedoms. But that proposition is only the start of the constitutional inquiry. The degree of impingement must then be weighed against the justification for the limits, as was done later in the *Buckley* opinion.

[28] *See, e.g.*, 435 U.S. at 795 (invalidating the ban because it prohibits protected speech "in a manner unjustified by a compelling state interest . . .").

Section 9012(f) differs importantly from the kinds of restrictions on the political uses of money in referenda that were before the Court in *Bellotti* and that are now before it in *Citizens Against Rent Control/Coalition for Fair Housing* v. *City of Berkeley, prob. juris. noted*, 49 U.S.L.W. 3616 (U.S. Feb. 23, 1981) (No. 80-737). "Referenda are held on issues, not candidates for public office. The risk of corruption perceived in cases involving candidate elections . . . simply is not present in a popular vote on a public issue." *Bellotti*, 435 U.S. at 790 (citations and footnote omitted).

[29] *See* Leventhal, *Courts and Political Thickets*, 77 Colum. L. Rev. 345, 361 (1977) ("[T]here is enduring significance in the acceptance of limitations on expenditures as a permissible con-

The less strict standard applies to Section 9012(f), because the Section is not designed to, and does not, censor or suppress speech thought to have a dangerous impact on its listeners.[30] Section 9012(f) is concerned, instead, with obligations actually or apparently incurred by a candidate; it seeks to eliminate the threats to governmental integrity and public confidence that arise when the managers of political committees amass and spend large private funds to help a publicly financed candidate.

The *Buckley* ruling upholding the contribution ceilings is closely in point here. Although phrased in terms of "expenditures," Section 9012(f) functions as a limitation on the operations of private fundraising organizations—political committees that solicit and collect private contributions to support a publicly funded candidate. The Section's effect upon the speech and associational rights of contributors is, for all substantial purposes, the same as that of the contribution ceilings in *Buckley*. In this case, as in *Buckley*, the contributor seeks only to pay for the speech of another—for speech that the contributor neither composes, nor publishes, nor controls. *See* pp. 8-9 *supra;* 424

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dition for public financing, [since] it seems plain enough that the Court would never have accepted a condition of financing that prohibited discussion of certain topics . . . ."). The Court also upheld, in *Buckley*, a $1,000 limit on campaign expenditures made by an individual at the request or with the consent of a candidate, even when the individual made the expenditure to publish his personal views. 424 U.S. at 46-47 & n.53.

[30] To be sure, Section 9012(f) reaches only "expenditures to further the election of" Presidential candidates who have accepted public financing. But the purpose in limiting the statute's reach is to tailor the proscription narrowly to the kinds of expenditures most likely to put the candidates under obligation, or appear to do so. Congress obviously was not attempting to censor particular ideas or information, or to give the expression of some messages forums or opportunities denied to others. *Compare Fowler* v. *Rhode Island*, 345 U.S. 67, 69-70 (1953); *Niemotko* v. *Maryland*, 340 U.S. 268, 272 (1951); *Cox* v. *New Hampshire*, 312 U.S. 569 (1941).

U.S. at 21. Under the provisions upheld in *Buckley*, the size of the contributor's gift is limited; in this case, his opportunity to give is lessened chiefly by the candidate's decision to substitute public funds but also by Section 9012(f)'s limitation on the sums that any one political committee may spend. Like the contribution ceilings upheld in *Buckley*, Section 9012(f) "does not in any way infringe the contributor's freedom to discuss candidates and issues." *Id.* at 21. *Accord, id.* at 58. Because it leaves everyone free to spend without limit for personal speech, Section 9012(f), like the contribution ceilings, does not "reduce the total amount of money potentially available to promote political expression," *id.* at 22, even though (again like the contribution ceilings) it may result in less money actually being spent. And Section 9012(f), like the contribution ceilings, is consistent with the First Amendment because it serves a compelling public purpose quite apart from the content or impact of words or ideas—protecting the integrity of government and public confidence in it.

The character of political committees like appellees, and the scale of their fundraising and spending, differentiate their expenditures from the individual "independent expenditures" that the Court held Congress could not prohibit on the record made in *Buckley*. That holding centered on the impact that Section 608(e)(1) of the FECA amendments had on individuals (whether acting singly or jointly) who desired to spend their own money to publish their own words and ideas. The *Buckley* opinion makes clear that the Court's attention was focused on situations in which the speakers were individuals paying for and expressing their own personal views, rather than professionally run partisan political fundraising operations using other people's money to reinforce the candidate's campaign. *See, e.g.*, 424 U.S. at 27 n.29, 48 n.54.[31] In the latter case, those who give the money are

[31] That the *Buckley* Court had in mind individual and personal expression is further demonstrated by its analogy of the expendi-

not engaging in personal expression; as in the case of a contribution directly to a candidate, there is "only a marginal restriction upon the contributor's ability to engage in free communication" because "the transformation of contributions into political debate involves speech by someone other than the contributor." *Id.* at 20-21. Moreover, in the situations at which Section 9012(f) aims—"independent" campaigns by professional committees such as appellees—there is scant likelihood that expenditures will "provide little assistance" to the candidate or "prove counterproductive," as appeared to be the case in *Buckley*. *Id.* at 47. Common sense and evidence point to the conclusion that committees such as appellees will provide substantial and valuable assistance to the candidate's campaign. *See* pp. 6-10 *supra* and 27-34 *infra*. Here, unlike in *Buckley*, there is ample reason to believe that expenditures pose a "danger that [they] will be given as a *quid pro quo* for improper commitments from the candidate." 424 U.S. at 47.

The Court's opinions, both before and after *Buckley*, confirm the difference between personal expenditures and expenditures by centrally managed massed funds. The opinions show keen appreciation of the danger that aggregated financial power poses. In *United States* v. *Automobile Workers*, 352 U.S. 567 (1957), Justice Frankfurter traced the long history of the "popular feeling that aggregated capital unduly influenced politics, an influence not stopping short of corruption." *Id.* at 570. Later, in *Pipefitters Local 562* v. *United States*, 407 U.S.

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ture limitations then before it to a single-tank limit on one's freedom to drive an automobile. 424 U.S. at 19 n.18. The analogy was apt, because the particular expenditure limitations in *Buckley* had the effect of limiting personal activity. Section 9012(f), however, does not. To continue the analogy, Section 9012(f) leaves all individuals and groups free to engage in unlimited personal driving and car-pooling; it reaches only situations where strangers pay for a bus ticket and then leave the driving to someone else.

385, 443 (1973), Justice Powell warned of the dangers of "reversing a trend since 1907, [and] open[ing] the way for major participation in politics by the largest aggregations of economic power, the great unions and corporations." Still more recently, in *Bellotti* the Court observed:

> "The overriding concern behind the enactment of statutes such as the Federal Corrupt Practices Act was the problem of corruption of elected representatives through the creation of political debts . . . . The importance of the governmental interest in preventing this occurrence has never been doubted. . . . *Congress might well be able to demonstrate the existence of a danger of real or apparent corruption in independent expenditures by corporations to influence candidate elections. Cf. Buckley v. Valeo, supra,* at 46 . . . ." 435 U.S. at 788 n.26 (emphasis added; citations omitted).

Moreover, lower Federal courts have sustained restrictions on expenditures by corporations and labor unions to influence candidate elections,[32] and this Court, despite opportunities to do so, has never held to the contrary. *See, e.g., United States* v. *Automobile Workers, supra; United States* v. *C.I.O.*, 335 U.S. 106 (1948). Expenditures from the amassed wealth of "independent" political committees pose the same dangers of undue influence and political debts as do expenditures by corporations and labor unions.

The danger of political indebtedness through large expenditures of aggregated funds is particularly great in

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[32] *See, e.g., United States* v. *Chestnut*, 533 F.2d 40, 50-51, (2d Cir. 1976), *aff'g* 394 F. Supp. 581, 588-91 (S.D.N.Y. 1975), *cert. denied*, 429 U.S. 829 (1976); *United States* v. *Boyle*, 482 F.2d 755, 763-64 (D.C. Cir.), *cert. denied*, 414 U.S. 1076 (1973); *Federal Election Commission* v. *National Right to Work Committee*, 501 F. Supp. 422, 437-38 (D.D.C. 1980) (*appeal pending*, D.C. Cir., No. 80-1487); *Federal Election Commission* v. *Weinsten*, 462 F. Supp. 243, 246-49 (S.D.N.Y. 1978).

the case of a publicly financed candidate, who may not take contributions and whose total campaign resources are limited by his decision to accept the public grant. Only Section 9012(f) is available to meet the threat that a publicly financed candidate, wittingly or unwittingly, will be put under heavy obligation to the managers of political committees who raise and spend millions of additional dollars to help him get elected.

B. Section 9012(f) Serves the Compelling Governmental Interest of Preserving the Integrity of, and Public Confidence in, the Presidency.

Starting in 1907, many Congresses have passed, and Presidents have signed, legislation designed to safeguard the integrity of elected Federal officeholders—and above all, the President.[33] Through these measures, the Political Branches—acting on the basis of their special knowledge, and supported by widespread public concern over corruption in government—have sought to deal with a recurring evil that this Court recognized a century ago: "the free use of money in elections." *Ex Parte Yarbrough*, 110 U.S. 651, 667 (1884). *See also United States* v. *Automobile Workers*, 352 U.S. at 575 (referring to the "continuing congressional concern for elections 'free from the power of money' ").

The Judicial Branch also has long recognized that preserving the integrity (and the appearance of integrity) of elected Federal officeholders is a most important governmental interest. In *Burroughs* v. *United States*, 290 U.S. 534 (1934), this Court, in sustaining the constitutionality of the Federal Corrupt Practices Act of 1925 as applied to Presidential elections, said:

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[33] *See* Justice Frankfurter's discussion of the history of these enactments in *United States* v. *Automobile Workers*, 352 U.S. at 570-83. *See also Pipefitters Local 562* v. *United States*, 407 U.S. at 402-13; *United States* v. *C.I.O.*, 335 U.S. at 113-15; *Burroughs* v. *United States*, 290 U.S. 534, 544-48 (1934).

> "The President is vested with the executive power of the nation. *The importance of his election and the vital character of its relationship to and effect upon the welfare and safety of the whole people cannot be too strongly stated.* To say that Congress is without power to pass appropriate legislation to safeguard such an election from the improper use of money to influence the result is to deny to the nation in a vital particular the power of self protection." *Id.* at 545 (emphasis added).

The Court similarly emphasized the importance of preserving the *appearance* of governmental integrity in *Civil Service Commission* v. *Letter Carriers*, 413 U.S. at 565, which sustained the Hatch Act's broad restrictions on political activities by federal employees. And *Buckley* made the point again:

> "It cannot be gainsaid that public financing as a means of eliminating the improper influence of large private contributions furthers a significant governmental interest. S. Rep. No. 93-689, pp. 4-5 (1974)." 424 U.S. at 96.

As we now show, Section 9012(f) serves this same compelling interest.

1. *Congress Enacted the Fund Act as a Means of Protecting the Presidency from the Corrosive Effects of Private Financial Support.*

The Fund Act was enacted because private money was corrupting the Nation's electoral and governmental processes. "[T]he deeply disturbing examples surfacing after the 1972 election demonstrate that the problem is not an illusory one." *Buckley*, 424 U.S. at 27 (footnote omitted).[34] By offering a Presidential candidate the option of

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[34] The Fund Act's system of public financing was, unfortunately, not in operation in 1972. It took effect the following year, *see* 26 U.S.C. § 9013, and first applied to the 1976 Presidential election.

receiving a generous public grant at the outset of the general election campaign, the Fund Act creates a strong incentive for the candidate to forswear private fund-raising, thus eliminating the likelihood that he would find himself beholden to private benefactors:

> "If the candidate chooses to accept public financing he or she is beholden unto no person and, if elected, should feel no post-election obligation toward any contributor of the type that might have existed as a result of a privately financed campaign." *Republican National Committee* v. *Federal Election Commission*, 487 F. Supp. at 284.

The legislative history fully reflects this purpose. The Fund Act's sponsor, Senator Pastore, stated it most eloquently:

> ". . . We are trying to rid this Government of the power of money and give it back to one man, one vote, one dollar. That is all we are talking about." 117 Cong. Rec. 42408 (1971).
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> * * * *
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> "The principle is still the same. It is the public financing of a Presidential campaign . . . . [A]ll we are saying is, 'Let's be done with it. Let the President be a free and independent man. Let him not be beholden to anyone.' " 119 Cong. Rec. 38900 (1973).[35]

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[35] These views were widely shared and echoed by other legislators. For example:

> "Whether we like it or not . . . politicians who become elected officials become beholden in the process to some special economic interest. This is the issue before the Senate. *Preserving the independence of the President is absolutely vital.* The Pastore amendment [*i.e.*, the Fund Act] would achieve that end." 117 Cong. Rec. 41938 (1971) (remarks of Senator Mansfield) (emphasis added).

Accord, e.g., id. at 41780 ("Big money buys entree. Big money buys favors. Favoritism, legal or otherwise, perverts the democratic process.") (remarks of Senator Eagleton).

And Senator Bentsen stressed that the "most compelling reason [why] we should enact legislation which permits a form of public financing of campaign funding" is to end "the deterioration of confidence of the people in their public officials." 117 Cong. Rec. 41767 (1971).[36]

The evils that Congress sought to eliminate were posed by private fundraising organizations as well as by large individual contributions. Congress therefore designed the Fund Act to enable the Nation

> "to have a President elected who would be able to make his appointments without determining that he has to send this man as an ambassador there because he raised $100,000, *or to do this for this group because of the money they raised.*" 117 Cong. Rec. 41945 (1971) (emphasis added) (remarks of Senator Chiles).

Without Section 9012(f), the Fund Act would fail to achieve Congress' goal.

2. *Section 9012(f) Is an Important and Necessary Part of the Fund Act.*

a. *Section 9012(f) Eliminates the Danger That Publicly Financed Presidential Candidates Will Be, or Appear To Be, Beholden to Private Fundraisers.*

Congress correctly found that a Presidential candidate who opts for public financing (and whose campaign expenditures are therefore limited to the amount of the public grant) could become obligated—or appear to be obligated—to political committees that raise and spend

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[36] The concern for public confidence in government was also widely shared: "Money in elections . . . threatens to undermine public confidence in those who are elected, and thus in the institution of government itself . . . ." *Id.* at 41778 (remarks of Senator Kennedy, *quoting* Senator Gore). *Accord, e.g.*, 117 Cong. Rec. 41780 (1971) (remarks of Senator Hart).

additional millions to help elect him. The risk of obligation is just as great as that created by large contributions. Indeed, fundraisers who manage committees such as appellees wield *more* power and influence than do individual contributors, as one of AEP's own "Media Directors" has acknowledged:

> "I think *it has always been true, however, that the people who wield the authority coming out of private fundraising are not the people who give the money so much as the people who raise the money, and that has not significantly changed.* If anything, it may have been accelerated [by the $1,000 limit on contributions] because *the guy who can raise $51,000 in contributions is the guy who is incredibly important to that campaign and therefore has a significant amount of power.*" [37]

The power that the fundraiser-manager of a political committee wields is not diminished simply because the committee is "independent." The operators of "independent" committees can acquire great influence with the candidate and his staff by financing and running consciously parallel campaigns. Appellees, for example, billed themselves as acting on behalf of Mr. Reagan [38] and promoted themselves as surrogates for the private campaign coffers that Mr. Reagan closed when he chose to receive public financing.[39] They filled in gaps for, and thus reinforced, the official Reagan campaign.[40] They

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[37] Deposition of Douglas L. Bailey at 28 in *Republican National Committee* v. *Federal Election Commission, supra* (emphasis added). *See* C.C. App. 76a-77a; C.C. App. (Supp.) 18b.

[38] Indeed, AFC expressly stated that its "newly founded 'Reagan for President in '80' project [was] established to raise over $20 million *on behalf of Ronald Reagan.*" C.C. App. (Supp.) 76 (emphasis added). *See also* note 10 *supra.*

[39] *See* pp. 6-7 and note 11 *supra.*

[40] FCM, for example, monitored the Reagan campaign throughout the country (both in the primaries and in the general election) and moved in with infusions of money, manpower and ad-

adapted their activities to the Reagan campaign strategy, relying on information released by the official campaign,[41] which in turn was well aware of appellees' operations.[42] Thus, a candidate's "independent" benefactors know perfectly well how to help him, and the candidate knows who is helping him and how much help he is getting:

> "The new professional staffs in PAC's . . . should not have much difficulty calculating from the candidate's own campaign strategy which kinds of independent expenditures would be most helpful to *and appreciated by him.*
>
> ". . . If PAC's can develop unrevealing names (*e.g.*, Citizens for Good Government), independent expenditures may become a relatively attractive campaign device. *Voters will not be likely to learn the*

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vertising in critical areas. *See The Boston Globe*, May 28, 1980, at 1 (New Hampshire, Pennsylvania and Texas primaries); Nyhan, *Sen. Don Nickles' Victory Given a Big Boost by Fund for Conservative Majority*, Conservative Digest 11, 12 (Jan. 1981) (large general election expenditures in Connecticut, New York Pennsylvania and Florida). Similarly, NCPAC's "Ronald Reagan Victory Fund" concentrated on Mississippi, Louisiana, Alabama, Texas, Illinois and Florida "because [the] Reagan effort needed bolstering" in those states. *NCPAC's Terry Dolan: He's Playing Key Role in New Right's Successes*, Conservative Digest 2, 4-5 (Dec. 1980).

[41] The Treasurer of FCM stated that "we pretty much know what the Reagan campaign strategy is from the newspapers." *The New York Times*, June 30, 1980, at B13, col. 4.

[42] The Reagan campaign learned about appellees' activities the way that appellees learned about the campaign's activities—through the newspapers. *See, e.g., The Washington Post*, July 10, 1980 at A3, col. 1 (describing the proposed activities of AEP); *The Los Angeles Times*, June 6, 1980 at 6, col. 5 (AFC); *The New York Times*, September 25, 1980, at B10 col. 6 (FCM); *The Boston Globe*, May 28, 1980 at 1, col. 6 (FCM); *The Washington Post*, June 6, 1980 at 1, col. 2 (AFC).

> *sources of these efforts, but the candidates whom PAC's wish to influence certainly will.*" [43]

Expenditures by "independent" political committees thus pose a real danger of creating (and appearing to create) political debts.

The district court erred in reaching a contrary conclusion. In ruling that Section 9012(f) is not supported by a sufficiently compelling governmental interest, the district court focused solely on the committees' essentially anonymous contributors, stating that it could not "imagine how the thousands of 'small voices' associated together in a political committee could compromise a candidate for President." C.C. App. 19a-20a. The court somehow missed the obvious influence acquired by the handful of fundraiser-managers who run the political committees and control the aggregated funds. But it is with those managers—and not with the contributors—that the real leverage (and thus the real danger) lies:

> "The real or effective financial constituency in these circumstances is the PAC and its leadership, not the small givers to PAC campaign warchests. The candidate knows the programs and objectives of the PAC, and it is to the PAC officers that preferred access is given." [44]

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[43] Adamany, *PAC's and the Democratic Financing of Politics*, 22 Ariz. L. Rev. 569, 601 (1980) (emphasis added). Mr. Adamany, a recognized expert on campaign finance, has also noted that large independent expenditures give rise to the *appearance* of impropriety:

> "[I]ndependent expenditures will be taken by a large segment of the public as evidence of liaison between officeholders and spenders, who will be assumed to have acquired some influence over public policy as a consequence of their outlays." *Id.* at 586 n.135.

[44] *Id.* at 596. In fact, such "preferred access" to the White House has already been given to the fundraiser-managers of two "independent" political committees—Robert C. Heckman, the

b. *Section 9012(f) Prevents Evasion of the Fund Act's Ban on Private Contributions to, and Its Limit on Expenditures by, Publicly Financed Presidential Candidates.*

Committees such as appellees are obvious vehicles for evading the Fund Act's ban on private contributions to, and its limit on expenditures by, a publicly financed campaign. The Congress that enacted the Fund Act in 1971 knew first-hand that "independent" political committees were traditional vehicles for evading then-existing Federal limits on campaign contributions and expenditures:

> "These federal ceilings on both contributions and expenditures were widely circumvented through the proliferation of committees. Committees openly supporting candidates called themselves independent, claiming to operate without the knowledge or consent of the candidates. . . . Often they were vest pocket committees." [45]

This proliferation of "independent" committees was one of the primary evils that the election-law reforms of 1971 were designed to rectify:

> "[P]rior to 1971 the laws regulating Federal campaigns permitted an infinite proliferation of *political committees which were ostensibly separate entities but which were in fact a means for advancing a candidate's campaign.* That deficiency brought the campaign laws into disrepute and provided an essential predicate for the 1971 and 1974 reforms that the Congress enacted." [46]

Chairman of FCM (*see* C.C. App. (Supp.) 44b) and John T. Dolan, the Chairman of NCPAC. *See The New York Times*, Mar. 8, 1981, at 24, col. 1.

[45] Leventhal, *Courts and Political Thickets*, 77 Colum. L. Rev. at 365.

[46] H.R. Rep. No. 94-917, 94th Cong., 2d Sess. 5 (1976) (emphasis added). The same point was made in the floor debate on the Fund Act:

Congress was right in concluding that "independent" political committees are ready tools for circumventing the law. Coordination can easily be effected surreptitiously through persons who hold positions with both an "independent" committee and one or more of the candidate's authorized committees (as some of appellees' personnel have done);[47] through interlocking campaign consultants, vendors and suppliers who work for both an "independent" committee and the official campaign (as some of appellees' consultants and vendors did);[48] through "indirect" communications between persons who work for an "independent" committee and others on the staff of the official campaign (as have taken place here);[49] and

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"In mentioning political committee, as the present terms of the bill does, the desire, of course, *is to prevent any political committees from being formed as a subterfuge* . . . ." 117 Cong. Rec. 42397 (1971) (remarks of Senator Taft).

[47] For example, the Assistant Treasurer of AFC was concurrently the Treasurer of the 1980 Republican Presidential Unity Committee and a consultant to the Republican National Committee; members of the AFC steering committee served concurrently on various arms of the Republican National Committee and the Reagan for President Committee. C.C. App. 75a; *see* note 7, *supra*. Similarly, two of the organizers of AEP took full-time positions on the official Reagan campaign. C.C. App. 76a.

[48] See note 18 *supra*.

[49] A blatant example of such communications was described by NCCC's "honorary chairman," Senator Jesse Helms, in a television interview:

"Well, as you may know, we have an independent effort going on in North Carolina. Uh, the law forbids me to consult with him [Mr. Reagan], and it's been an awkward situation. I've had to, sort of, uh, talk indirectly with Paul Laxalt [Mr. Reagan's campaign Chairman] and hope that he would pass along . . . uh, and I . . . I think the messages have gotten through all right . . . ."

(*Quoted in* Plaintiffs' Opening Brief on the Merits, *supra* note 11, at 27 n.28.)

through an "independent" committee's use of the facilities of, and campaign materials derived from, the candidate's official campaign (as has also happened here).[50]

Because of the ease with which "independent" political committees could evade the Fund Act's requirements and the near-impossibility of proving clandestine coordination in time to enjoin it, a prophylactic rule was required.[51] Congress therefore enacted Section 9012(f), in full accord with this Court's admonition not to "naively underestimate the ingenuity and resourcefulness of persons and groups desiring to buy influence . . . ." *Buckley*, 424 U.S. at 45.

c. *Section 9012(f) Effectuates Congress' Intent That Public Financing Be an Alternative to Privately Financed Campaigns.*

Congress intended public financing to serve as a substitute for, and not a supplement to, privately raised

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[50] For example, AFC used press facilities of, and was on the official program at, the 1980 Republican National Convention. *See* C.C. App. 78a; C.C. App. (Supp.) 11b. Similarly, FCM acquired and used a mailing list of 180,000 names that had been compiled by an earlier Reagan campaign. *See The New York Times*, June 30, 1980, at B13, col. 3. Assistance flowed the other way as well. Campaign materials prepared by the NCCC "Americans for Reagan" project were distributed at Reagan-Bush Committee offices as well as at local Republican Party headquarters. *See* Affidavit of David Schwartzbaum, Oct. 18, 1980; Affidavit of Peter Butzin, Nov. 6, 1980. (The affidavits were submitted to the Commission by Common Cause on November 17, 1980.)

[51] Coordination, like conspiracy, is very difficult and time-consuming to prove. The few months that elapse from the start to the end of the general election campaign almost certainly will not provide enough time to develop proof of coordination. That would be true even under procedures far more accelerated than those the Commission follows. *See* 2 U.S.C. § 437g (Supp. III 1979). (Indeed, Common Cause's own complaint against appellees and similar committees has been before the Commission now for over seven months. *See* note 19 *supra*.)

campaign funds.[52] Invalidating Section 9012(f) would defeat the Congressional purpose by allowing millions of dollars in privately raised contributions to swamp the public grant.

In the few months between the nominations and the election, and despite the proscription of Section 9012(f), appellees and two similar committees accumulated over $13 million. *See* p. 7 *supra*. If Section 9012(f) were invalidated, that would be only the beginning. These five committees collected over $21.5 million during the two years preceding the 1980 election,[53] and they would raise much more than that between now and the 1984 election if Section 9012(f) is struck down. Moreover, additional political committees similar to appellees would also be formed; like appellees, they would serve as vehicles through which professional political managers and fundraisers provide million-dollar supplements to their candidates' public subvention.[54] Corporate, labor,

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[52] *See, e.g.*, 117 Cong. Rec. 41780 (1971) (statement of Senator Hart that the public fund is not intended to be a "base for ever-increasing campaign spending"). *See also Buckley*, 424 U.S. at 99; *Republican National Committee* v. *Federal Election Commission*, 487 F. Supp. at 282.

[53] According to the data compiled by the Commission and lodged with the Court, the five committees had the following receipts during 1979-1980:

AFC	$ 1,072,549
AEP	1,920,377
FCM	3,093,544
NCCC	7,873,974
NCPAC	7,600,637
Total	$21,561,081

The relatively smaller collections of AFC and AEP reflect the fact that those committees were not even in existence until the last six months of 1980.

[54] At least two committees are apparently already being formed to support Democratic candidates; each seeks to raise $1,000,000 in its first year alone. *See The Wall Street Journal*, Feb. 3, 1981, at 22 col. 3; *The Washington Post*, Feb. 11, 1981, at C1, col. 1

and trade association political action committees would also follow suit. Given the rapid growth, enormous total wealth, and propensity to spend of such committees,[55] the sums that would be injected into efforts to influence the outcome of future Presidential elections would unquestionably eclipse the public grant; they could easily approach $100 million.[56]

The invalidation of Section 9012(f) would thus completely undercut the basic function of the Fund Act and revive the evils the Fund Act was intended to eliminate. Political committees representing private interests of all kinds would once again be free to leave "sort of a calling card, something that would get us in the door and make our point of view heard."[57] The campaign finance clock would be turned back to 1972, to the Nation's detriment.

C. Section 9012(f) Is Narrowly Tailored To Deal with the Most Serious Threats to the Independence and Integrity of Publicly Financed Presidential Candidates.

Section 9012(f) places no limit on expenditures by any individual of his own money to support Presidential

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& C8, col. 1; *id.*, Mar. 19, 1981, at D2, col. 2; *id.*, May 6, 1981, at 28; *Associated Press Washington Dateline*, Apr. 30, 1981 (AM Cycle).

[55] *See, e.g.*, H. ALEXANDER, FINANCING POLITICS 84-86 (2d ed. 1980).

[56] According to the data compiled by the Commission and lodged with the Court, 2751 non-party-related political committees had aggregate receipts of over $140 million and made aggregate disbursements of over $133 million during 1979-1980. If such committees were freed to raise and spend money for publicly funded Presidential campaigns, their collections would rise—probably appreciably—and a large portion of their money would be diverted to efforts to influence the Presidential election.

[57] *Hearings Before the Senate Select Comm. on Presidential Campaign Activities*, 93d Cong., 1st Sess. 5442 (1973) (testimony of Orin Atkins, Chairman of Ashland Oil Company).

candidates. Section 9012(f) applies only to "political committees," and the definition of that term does not include individuals. *See* 26 U.S.C. § 9002(9).[58]

Similarly, Section 9012(f) imposes no restriction on the freedom of two or more individuals, pooling and using their own money, to engage jointly in personal expression to support their preferred candidate. Section 9012(f) does not reach groups of individuals that do not constitute "political committees" within the meaning of the Fund Act.[59] The legislative history confirms that Congress did not intend to restrict the activities of groups of individuals who engage jointly in personal expression paid for out of their own pockets.[60]

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[58] The Conference Committee specifically rejected a Senate provision that would have subjected individuals to Section 9012(f). H.R. Rep. No. 92-708, 92d Cong., 1st Sess. 58 (1971).

[59] The statutory language makes clear that not all groups are "political committees." The Fund Act defines a "political committee" to include only a "committee, association, or organization (whether or not incorporated) . . . ." 26 U.S.C. § 9002(9). By contrast, the Federal Election Campaign Act ("FECA") defines a "political committee" as including "any committee, *club*, association *or other group of persons* . . . ." 2 U.S.C. § 431(4)(A) (Supp. III 1979) (emphasis added). Similarly, the Presidential Primary Matching Payment Account Act defines a "political committee" as including "any *individual*, committee, association, or organization (whether or not incorporated) . . . ." 26 U.S.C. § 9032(8) (emphasis added). These significant differences in the statutory language confirm that not all groups fall within the narrower Fund Act definition of "political committee." *Cf. Board of Governors* v. *Agnew*, 329 U.S. 441, 448 (1947) ("[t]he inference seems reasonable . . . that Congress by the words it chose marked a distinction which we should not obliterate . . . .").

[60] Senator Taft had proposed to amend Section 9012(f) by deleting the term "political committee" and substituting the much broader clause "any corporation, labor organization, partnership, association, political committee, political education committee, or any other committee." 117 Cong. Rec. 42397 (1971). Senator Pastore opposed this broad language because, in his view, it would

Section 9012(f) is thus specifically tailored to eliminate the most serious threats to the independence and integrity of publicly financed Presidential candidates. The Section applies only to entities—"political committees"—that collect contributions from persons who do not participate in or control the entities' activities but merely respond to requests for money. Such committees constitute uniquely potent vehicles for acquiring improper political influence, not only because their aggressive mechanized fundraising techniques permit the committees' managers to amass huge political funds, but also because control over the funds resides in a handful of fundraiser-managers who thus enjoy enormous leverage. *See* pp. 8-9, 27-29 *supra*. A publicly financed Presidential candidate, limited in his campaign spending to the amount of the public grant, could easily become obligated (or appear to be obligated) to such benefactors for their assistance to his election effort. Moreover, political committees pose a particularly grave threat to the proper and effective functioning of the public financing scheme because of the ease with which they can be used to evade the Fund Act's prohibition against contributions to, and its limit on expenditures by, a publicly financed candidate's campaign. *See* pp. 30-32 *supra*.

Because of the vast amount of money they can raise and control to benefit a candidate, political committees pose a much greater threat to the independence and

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have brought personal expression within the prohibition of Section 9012(f). *Id.* at 42399 (". . . I do not want to begin to straitjacket organizations that have a legal right, because of the character of their constitution, to proceed to express their *personal* opinion . . ." (emphasis added)). Senator Pastore clearly believed that groups of individuals should be free to pool and spend their own money for their own personal expression. *See id.* at 42398 ("a group on a campus, say faculty members"), 42401 (same), 42626 (a group of people who want to get together, pool their own money, and hire a hall to hold a mass meeting). Senator Pastore's view prevailed, and the Taft amendment was defeated. *Id.* at 42402.

integrity of publicly funded candidates than do individuals, whether acting singly or jointly. There are, to be sure, some very wealthy individuals who may use their wealth to make large personal expenditures to support a publicly funded candidate. But such expenditures pale beside the sums that political committees can and will pump into shadow campaigns for publicly financed candidates if Section 9012(f) is struck down. *See* pp. 7-8, 33-34 *supra*.[61] This fact reflects what Congress has long known and this Court has long acknowledged—that aggregated financial power poses the greatest threat to our democratic processes. *See* pp. 21-23 *supra*. Section 9012(f) is precisely tailored to meet that threat.[62]

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[61] The presently available data from the 1980 election confirm that personal expenditures by individuals pose a much smaller threat of influence-buying than do expenditures by political committees. Although independent expenditures by individuals were plainly unrestricted by law, only four individuals made independent expenditures in excess of $5,000 to advocate the election or defeat of Mr. Carter or Mr. Reagan, and the total sums spent by all individuals were smaller by far than the sums spent by appellees. *See* Federal Election Commission, *1979-1980 Candidate Index of Supporting Documents—(E)* (Apr. 6, 1981) (computer printout). The data from the 1976 election also leads to the same conclusion. *See* Federal Election Commission, *FEC Disclosure Series No. 3, Index of Independent Expenditures By Individuals and Receipts and Expenditures by Unauthorized Delegates, 1976 Campaign*, March 1977.

[62] This conclusion is, of course, not affected by the possibility that some political committees might conduct their fundraising and campaigns in such a manner that the dangers would not materialize. It is enough that Congress reasonably found that political committees generally pose a potential for serious harm and enacted a statute designed to deal particularly with it. Congress did the same thing when it placed limits on all political contributions even though some large contributions might not actually give rise to corruption, and this Court upheld Congress' action. *See Buckley*, 424 U.S. at 23-29. Section 9012(f) is therefore not overinclusive.

Similarly, Section 9012(f) is not underinclusive by virtue of applying only when a candidate accepts public financing. To be

D. Section 9012(f) Leaves Ample Room for the Exercise of Speech and Associational Freedoms.

Section 9012(f) does not significantly interfere with the exercise of First Amendment freedoms. It leaves individuals (and groups of individuals acting jointly) free to make unlimited independent expenditures of their own money for their own political expression in Presidenti campaigns.[63] *See* pp. 34-35 *supra*. It thus puts no ceiling on the aggregate amount of money that can be spent for expression in support of a candidate.[64] All Section 9012(f) does, at bottom, is require that persons (and groups of persons) who wish to engage in independent political advocacy in support of a publicly funded candidate do it themselves, using their own money for their own personal expression, rather than pay for the speech of others (or get others to pay for their speech) through contributions that involve only "marginal" First Amendment interests. *Buckley*, 424 U.S. at 20.

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sure, the activities of committees such as appellees may pose a similar threat to the integrity and independence of candidates who choose not to accept public financing. But the objective of the Fund Act was to provide a sufficiently generous public grant so that candidates would choose public financing and forswear private fundraising. The Fund Act has successfully accomplished that objective: Every major Presidential candidate since the Fund Act took effect has chosen public financing in the general election. Thus Section 9012(f) is, as a practical matter, as broad as it needs to be to accomplish its purposes. And, in any event, the fact that Congress might have made Section 9012(f) more broadly applicable provides no basis for striking it down. *See, e.g., Buckley*, 424 U.S. at 105 (citing prior cases for the proposition that Congress may undertake reform "one step at a time, addressing itself to the phase of the problem which seems most acute").

[63] By contrast, the across-the-board restriction on independent expenditures that the Court overturned in *Buckley* barred essentially *all* expenditures by *all* individuals, as well as by *all* groups, in *all* Federal elections. *See* 424 U.S. at 39-40 & n.45.

[64] By contrast, the expenditure restrictions overturned in *Buckley* drastically limited the overall amount of political debate. *See id.* at 39, 55.

Section 9012(f) leaves open to everyone broad avenues for the exercise of speech and associational freedoms in connection with Presidential elections. For example, anyone may contribute his time and energy to work for any candidate, political party, committee, group or other entity. *See* 2 U.S.C. § 431(8)(B)(i). Such participation encompasses a wide variety of traditional "grass-roots" activities, including helping to devise local campaign strategy, staging rallies, distributing leaflets and other campaign materials, making door-to-door or telephone appeals, and driving voters to the polls on election day.[65] Accordingly, Section 9012(f), like the contri-

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[65] Political parties and Congress alike have repeatedly acknowledged that such "grass-roots" activities by individuals are—even in this electronic age—important and valuable avenues of political participation. For example, in connection with the 1980 general election campaign the Republican National Committee undertook a nationwide program (called "Commitment '80") "to mobilize thousands of Reagan volunteers to conduct door-to-door distribution of campaign literature, to identify Reagan supporters, and to ensure that those identified supporters get to the polls on election day." FEC Statement, *supra* note 12, ¶ 63. The importance of such activities is further highlighted by the Joint Findings of Fact in the *Republican National Committee* case, which discussed the concern of the major national parties over the need to curtail grass-roots activities in order to keep within the Fund Act's spending limits in the 1976 general election campaign. *See* 487 F. Supp. at 293-98. Congress responded to this concern by enacting the Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, 93 Stat. 1339, which permit State and local party committees to make unlimited expenditures to support grassroots activities. Congress thereby emphasized again the importance of such avenues for individual participation in the election process. *See, e.g.*, S. Rep. No. 96-319, 96th Cong., 1st Sess. at 1, 2, 4, 9 (1979); H.R. Rep. No. 96-422, 96th Cong., 1st Sess. at 2, 9 (1979).

Such personal political participation therefore cannot be dismissed as ineffective or meaningless. To do so would imply a cynical and unsupportable view of our participatory democracy, for these activities "sustain the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government." *United States* v. *Automobile Workers*, 352 U.S. at 575, *quoted in Bellotti*, 435 U.S. at 788-89.

bution limits upheld in *Buckley*, leaves every person completely "free to become a member of any political association and to assist personally in the association's efforts on behalf of candidates." 424 U.S. at 22.

Moreover, everyone can find numerous other ways to support publicly financed candidates consistently with Section 9012(f). For example, individuals (acting either singly or jointly) can purchase advertisements in local newspapers;[66] they can purchase local billboard space; they can prepare, reproduce and distribute handbills to their fellow citizens; and they can call in to radio "talk shows" or speak out in other forums to advocate the election of their favored candidate.

Individuals can also participate in more broadly based efforts. Section 9012(f) leaves all persons free to help a publicly financed candidate by contributing money to his party's national committee, which may in turn spend up to a specified limit (approximately $4.7 million in 1980) to promote the party's national ticket. *See* 2 U.S.C. §§ 441a(a)(1)(B), 441a(d)(2).[67] Every individual can also help a publicly financed candidate by contributing money to his party's state and local communities, which may in turn use as much of their money as they wish to support the candidate through campaign materials and get-out-the-vote activities. *See* 2 U.S.C. § 431(9)(B)(viii), (ix) (Supp. III 1979). And Section 9012(f) also allows everyone to support large-scale media discussions of particular issues by contributing money to purely issue-oriented, non-partisan organizations that buy radio,

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[66] They can, of course, also purchase advertisements in more expensive, nationally circulated newspapers, since the Fund Act imposes no ceiling on independent expenditures by individuals. Some persons have in fact purchased such advertisements. *See, e.g., The New York Times*, Oct. 30, 1980, at B8, cols. 1-3.

[67] The limit is equal to two cents times the national voting age population, adjusted for changes in the Consumer Price Index. *See* 2 U.S.C. §§ 441a(c), (d)(2).

television and newspaper space to advocate their positions.[68] The district court therefore clearly erred in asserting that Section 9012(f) prevents "individuals of modest means" from "join[ing] with others to state their views to the public with some force." C.C. App. 22a.

Section 9012(f) thus does not impose any significant restriction on the exercise of First Amendment freedoms. It does not restrict anyone's own speech. It allows full participation in traditional campaign activities and permits contributions to a publicly financed candidate's political party. The only associational interests the Section affects are the "marginal" interests inherent in making contributions to unaffiliated political committees. 424 U.S. at 20. Under *Buckley*, Congress may constitutionally limit those interests in order to protect the integrity of elected Federal officeholders and preserve public confidence in government. *Id.* at 29. Even "broad restrictions on . . . associational freedoms" can constitutionally be imposed for that purpose where—as here—everyone remains free to "[e]xpress his opinion as an individual privately and publicly on political subjects and candidates." *Buckley*, *id.* at 48 n.54 (discussing and quoting *Civil Service Commission* v. *Letter Carriers*, 413 U.S. at 579).

II. THE DISTRICT COURT ERRED IN HOLDING SECTION 9012(f) UNCONSTITUTIONAL WITHOUT ALLOWING THE DEVELOPMENT OF A FACTUAL RECORD.

Preserving the integrity of the Presidency and public confidence in it are compelling governmental interests that justify narrowly tailored restrictions on some speech and associational activities. Congress concluded—based

[68] Section 9012(f) does not reach "groups engaged purely in issue discussion," since only "organizations that are under the control of a candidate *or the major purpose of which is the nomination or election of a candidate*" constitute "political committees." *Buckley*, 424 U.S. at 79 (emphasis added).

on its own special insight into political realities, as well as on matters of common knowledge—that Section 9012(f) would contribute to the achievement of these important public interests. These congressional judgments are entitled to great weight, particularly since they involve matters in which Congress has special expertise.[69] If, however, this Court is reluctant to give effect to Congress' conclusions and is not satisfied on the present record of this case that Section 9012(f) serves compelling governmental interests, then the appropriate course is to remand the case for a trial in order to give appellants the opportunity to demonstrate, through evidence and testimony, that Congress was correct.

Appellants sought discovery bearing directly on the constitutionality of Section 9012(f). That discovery would have illuminated several important factual questions, including

> —whether, as Congress knew first-hand to be the case, the activities of "political committees" are controlled by their organizers and managers, rather than by their contributors;
>
> —whether, as Congress concluded, large expenditures by unaffiliated political committees to further the election of a candidate barred from using private contributions pose a danger of creating (or appearing to create) political debts owed to the managers of the committees; and
>
> —whether, as Congress apparently also concluded, ample and meaningful opportunities for the exercise of speech and associational freedoms are left open by a statute that limits expenditures by political committees but does not limit expenditures for personal advocacy and discussion.

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[69] *See, e.g., Fullilove* v. *Klutznick*, 100 S. Ct. 2758, 2771-72, 2775 (1980); *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 102-03 (1973); *Katzenbach* v. *Morgan*, 384 U.S. 641, 655-56 (1966); *Burroughs* v. *United States*, 290 U.S. at 547.

The district court disallowed all of appellants' discovery. It addressed these questions on the bare pleadings and resolved them on the basis of its own political intuition.[70] Not surprisingly, the district court reached a demonstrably erroneous conclusion on each point:

(1) The district court stated that the contributors "have power over the speech disseminated by the political committees," C.C. App. 16a, but the record—such as it was—showed just the opposite. *See* pp. 8-9 *supra*.

(2) The district court perceived no threat of actual or apparent political *quid pro quo*'s through independent expenditures by political committees, App. 19a, but experts on campaign finance practices say the threat is there. *See* pp. 27-29 *supra*.

(3) The district court apparently believed that candidates could become beholden at most only to the committees' contributors (the "small voices") and not to the committees' organizers or managers, C.C. App. 19a-20a, but campaign finance experts say the opposite is true. *See* pp. 27, 29 *supra*.

(4) The district court believed that Section 9012(f) hampers "the speech of individual contributors," C.C. App. 15a, but the Section does not limit personal expression, and it in fact leaves open wide avenues for political advocacy and participation. *See* pp. 38-41 *supra*.

The district court was wrong in disallowing discovery and cutting off all factual development. Section 9012(f)

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[70] The district court should, of course, have resolved all factual uncertainties in favor of appellants, since the case was before the court on motions by appellees to dismiss and for summary judgment. The court turned this well-established principle on its head by drawing all factual inferences, and resolving all factual uncertainties, in favor of the parties seeking dismissal. This error warrants a remand. *See, e.g., Conley* v. *Gibson*, 355 U.S. 41 (1957); *United States* v. *Diebold, Inc.* 369 U.S. 654 (1962) (*per curiam*).

should not have been invalidated in the absence of "the concrete factual setting that sharpens the deliberative process especially demanded for constitutional decision." *United States* v. *Automobile Workers*, 352 U.S. at 591; *see also Public Affairs Associates, Inc.* v. *Rickover*, 369 U.S. 111, 113 (1962) (*per curiam*) (referring to the need for an "adequate and full-bodied record"), *quoted in H.L.* v. *Matheson*, 101 S. Ct. 1164, 1173 n.25 (1981). Instead of developing a full and concrete factual record about the nature, operations and dangers of political committees and applying the First Amendment "compelling interest" standard to that record, the district court in effect held that Section 9012(f) was *per se* unconstitutional simply because it regulates "independent expenditures." But there is no such rule of *per se* unconstitutionality, *see* pp. 15-23 *supra*, and the district court's short-cut was improper.

Section 9012(f) may not be held unconstitutional in the absence of a factual record, and "[t]he application of [the constitutional standard] to the evidence in the record is, in the first instance, a task for the District Court." *Mandel* v. *Bradley*, 432 U.S. 173, 179 (1977) (*per curiam*) (vacating the judgment and remanding where the three-judge district court had erroneously applied a *per se* rule of unconstitutionality instead of "sift[ing] through the conflicting evidence and mak[ing] findings of fact . . . ," *id.* at 178). Thus, if this Court is unwilling to uphold Section 9012(f) on the present record, it should vacate the decision below and remand the case to the district court with directions to develop a factual record and to apply the correct constitutional standard to it.[71]

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[71] This Court has consistently vacated and remanded where necessary to develop a factual record for constitutional adjudication. *See, e.g., Storer* v. *Brown*, 415 U.S. 724, 738-40 (1974) (three-judge district court decision vacated and remanded because in order to "assess realistically whether the [election] law imposes excessively burdensome requirements . . . it is necessary to know

CONCLUSION

For the reasons stated above, the Court should reverse the judgment of the district court. If, however, the Court should find that the record is insufficient to support reversal of the judgment, it should vacate the decision below and remand the case for factual development concerning (1) the nature and organization of political committees such as appellees, (2) their operations, (3) the relationship between the committees' managers and the contributors, (4) the dangers of actual or apparent political *quid pro quo*'s that such committees pose, and (5) the extent to which limits on such committees' expenditures leave open opportunities for political expression and participation by individual citizens.

Respectfully submitted,

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other critical facts which do not appear from the evidentiary record"); *Polk Co.* v. *Glover*, 305 U.S. 5, 10 (1938) *(per curiam)* (reversing and remanding decision of three-judge district court); *Borden's Co.* v. *Baldwin*, 293 U.S. 194, 208-13 (1934) (same). *See also Gilmore* v. *Montgomery*, 417 U.S. 556, 570-74 (1974); *Askew* v. *Hargrave*, 401 U.S. 476, 478-79 (1971) *(per curiam)* (pleadings and affidavit "inadequate as a basis for deciding" constitutional claim which "should not be decided without fully developing the factual record at a hearing").